

CHAPTER NO. 728

HOUSE BILL NO. 3539

**By Representatives Overbey, Cochran, Ferguson, Sargent, McDaniel,
Harrison, McKee, Roach**

Substituted for: Senate Bill No. 3576

By Senators Person, Finney

AN ACT to amend Tennessee Code Annotated, Title 29, Chapter 34, to enact the "Silica Compensation Fairness Act".

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 29, Chapter 34, is amended by adding Sections 2 through 12 of this Act as a new part.

SECTION 2. This part shall be known and may be cited as the "Silica Claims Priorities Act."

SECTION 3.

(a) Silica is a naturally occurring mineral and is the second most common constituent of the earth's crust.

(b) Silica-related disease, including silicosis, can occur when silica is inhaled. To be inhaled, silica particles must be sufficiently small to be respirable.

(c) Silicosis was recognized as an occupational disease many years ago. The American Foundry Society has distributed literature to its members warning of the dangers of silica exposure for more than seventy (70) years. By the 1930s, the federal government had launched a silica awareness campaign that led to greater protection for workers exposed to silica dust.

(d) The Legislature finds that the public interest requires giving priority to the claims of exposed individuals who are sick in order to help preserve, now and for the future, access to our court system for those who develop silica-related disease and to safeguard the jobs, benefits, and savings of workers in Tennessee.

It is the purpose of this part to:

(1) Give priority to silica claimants who can demonstrate actual physical impairment caused by exposure to silica;

(2) Fully preserve the rights of claimants who were exposed to silica to pursue compensation should they become impaired in the future as a result of such exposure;

(3) Enhance the ability of the judicial system to supervise and control silica litigation; and

(4) Provide access to our court system for those who are actually physically impaired by exposure to silica while securing the right to similar access for those who may suffer physical impairment in the future.

SECTION 4. As used in this part, unless the context otherwise requires:

(1) "AMA guides to the evaluation of permanent impairment" means the most recent version of the American Medical Association's "Guidelines for Assessment of Permanent Medical Impairment" at the time of the performance of any examination or test required under this Act;

(2) "Board-certified" means the medical doctor is currently certified by one of the medical specialty boards approved by either the American Board of Medical Specialties or the American Osteopathic Board of Osteopathic Specialties.

(3) "Board-certified in occupational medicine" means a medical doctor who is certified in the subspecialty of occupational medicine by the American Board of Preventive Medicine or the American Osteopathic Board of Preventive Medicine;

(4) "Board-certified oncologist" means a medical doctor who is certified in the subspecialty of medical oncology by the American Board of Internal Medicine or the American Osteopathic Board of Internal Medicine;

(5) "Board-certified pathologist" means a medical doctor who holds primary certification in anatomic pathology or clinical pathology from the American Board of Pathology or the American Osteopathic Board of Internal Medicine;

(6) "Board-certified pulmonary specialist" means a medical doctor who is certified in the subspecialty of pulmonary medicine by the American Board of Internal Medicine or the American Osteopathic Board of Internal Medicine;

(7) "Certified B-reader" means a person who has successfully completed the x-ray interpretation course sponsored by the National Institute for Occupational Safety and Health (NIOSH) and passed the B-reader certification examination for x-ray interpretation and whose NIOSH certification is current at the time of any readings required by this chapter.

(8) "Civil action" means all suits or claims of a civil nature in a court of record, whether cognizable as cases at law or in equity or admiralty. "Civil action" does not include any of the following:

(A) A civil action relating to any claim for workers compensation under title 50;

(B) A civil action alleging any claim or demand made against a trust established pursuant to 11 U.S.C. § 524(g);

(C) A civil action alleging any claim or demand made against a trust established pursuant to a plan of reorganization confirmed under the United States Bankruptcy Code; or

(D) A civil action arising under the Federal Employers Liability Act pursuant to 45 U.S.C. § 51 et seq.

(9) "Competent medical authority" means a medical doctor who meets the following requirements:

(A) The medical doctor is board-certified in occupational medicine, a board-certified oncologist, a board-certified pathologist, or a board-certified pulmonary specialist;

(B) The medical doctor is actually treating, or has treated, the exposed person and has or had a doctor-patient relationship with the exposed person, or in the case of a board-certified pathologist, has examined tissue samples of pathological slides of the exposed person at the request of a treating medical doctor;

(C) As the basis for the diagnosis, the medical doctor has not relied, in whole or in part, on any of the following:

(i) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the exposed person's medical condition in violation of any law, regulation, licensing requirement, or medical code of practice with regard to the diagnosis set forth in the report required pursuant to Section 6 of this Part of the state in which that examination, test, or screening was conducted; or

(ii) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the exposed person's medical condition outside the context of an existing doctor-patient relationship; or

(iii) The reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the exposed person's

medical condition that required the exposed person to agree to retain the services of a law firm or lawyer sponsoring the examination, test, or screening;

(D) The medical doctor spends not more than twenty-five percent (25%) of such doctor's annual practice time in providing consulting or expert services in connection with prosecuting or defending actual or potential tort actions, and the medical doctor's medical group, professional corporation, clinic, or other affiliated group earns not more than twenty-five percent (25%) of its revenues from providing such services; and

(E) The requirements for determining "competent medical authority" set forth in Sections (B) through (D) may be waived by written agreement of all of the parties.

(10) "Exposed person" means a person whose exposure to silica or mixed dust is the basis for a silicosis claim or mixed dust disease claim under the part;

(11) "ILO scale" means the system for the classification of chest x-rays set forth in the International Labour Office's "Guidelines for the Use of ILO International Classification of Radiographs of Pneumoconioses," 2000 edition, or if amended, the version in effect at the time of the performance of any examination or test on the exposed person required under this Act;

(12) "Lung cancer" means a malignant tumor in which the primary site of origin of the cancer is inside the lungs;

(13) "Mixed dust" means a mixture of dusts composed of silica and one (1) or more other fibrogenic dusts capable of inducing pulmonary fibrosis if inhaled in sufficient quantity;

(14) "Mixed dust disease claim" means any claim for damages, losses, indemnification, contribution, or other relief arising out of, based on, or in any way related to inhalation of, exposure to, or contact with mixed dust. "Mixed dust disease claim" includes a claim made by or on behalf of any person who has been exposed to mixed dust, or any representative, spouse, parent, child, or other relative of that person, for injury, including mental or emotional injury, death, or loss to the person, risk of disease or other injury, costs of medical monitoring or surveillance, or any other effects on the person's health that are caused by the person's exposure to mixed dust;

(15) "Mixed dust pneumoconiosis" means the lung disease caused by the pulmonary response to inhaled mixed dusts, and does not mean silicosis and another pneumoconiosis, including, but not limited to, asbestosis;

(16) "Nonmalignant condition" means a condition, other than a diagnosed cancer, that is caused or may be caused by either silica or mixed dust, whichever is applicable;

(17) "Pathological evidence of mixed dust pneumoconiosis" means a statement by a board-certified pathologist that more than one (1) representative section of lung tissue uninvolved with any other disease process demonstrates a pattern of peribronchiolar and parenchymal stellate (star-shaped) nodular scarring and that there is no other more likely explanation for the presence of the fibrosis;

(18) "Pathological evidence of silicosis" means a statement by a board-certified pathologist that more than one (1) representative section of lung tissue uninvolved with any other disease process demonstrates a pattern of round silica nodules and birefringent crystals or other demonstration of crystal structures consistent with silica (well-organized concentric whorls of collagen surrounded by inflammatory cells) in the lung parenchyma and that there is no other more likely explanation for the presence of the fibrosis;

(19) "Physical impairment" means a condition of an exposed person as defined in Section 5(a)(3), 5(b)(3) or (4), or 5(c)(3) or (4) of this Act;

(20) "Premises owner" means a person who owns, in whole or in part, leases, rents, maintains, or controls privately owned lands, ways, or waters, or any buildings and structures on those lands, ways, or waters, and all privately owned and state-owned lands, ways, or waters leased to a private person, firm, or organization, including any buildings and structures on those lands, ways, or waters;

(21) "Radiological evidence of mixed dust pneumoconiosis" means an ILO quality chest x-ray read by a certified B-reader as showing bilateral rounded or irregular opacities in the upper lung fields graded at least 1/1 on the ILO scale;

(22) "Radiological evidence of silicosis" means an ILO quality chest x-ray read by a certified B-reader as showing either bilateral small rounded opacities (p, q, or r) occurring primarily in the upper lung fields graded least 1/1 on the ILO scale or A, B, or C sized opacities representing complicated silicosis (also known as progressive massive fibrosis);

(23) "Silica" means a respirable crystalline form of the naturally occurring mineral form of silicon dioxide, including, but not limited to, quartz, cristobalite, and tridymite;

(24) "Silica claim" means any claim for damages, losses, indemnification, contribution, or other relief arising out of, based on, or in any way related to inhalation of, exposure to, or contact with silica. "Silica claim" includes a claim made by or on behalf of any person who has been

exposed to silica, or any representative, spouse, parent, child, or other relative of that person, for injury, including mental or emotional injury, death, or loss to the person, risk of disease or other injury, costs of medical monitoring or surveillance, or any other effects on the person's health that are caused by the person's exposure to silica;

(25) "Silicosis" means a lung disease caused by the pulmonary response to inhaled silica;

(26) "Substantial contributing factor" means both of the following:

(A) Exposure to silica or mixed dust is the predominate cause of the physical impairment alleged in the silica claim or mixed dust disease claim, whichever is applicable; and

(B) A competent medical authority has determined with a reasonable degree of medical certainty that without the silica or mixed dust exposures the physical impairment of the exposed person would not have occurred;

In determining whether exposure to a silica or mixed dust was a substantial contributing factor in causing the plaintiff's injury or loss, the trier of fact in the action shall consider, without limitation, all of the following:

(i) The manner in which the plaintiff was exposed;

(ii) The proximity of silica or mixed dust to the plaintiff when the exposure occurred;

(iii) The frequency and length of the plaintiff's exposure; and

(iv) Any factors that mitigated or enhanced the plaintiff's exposure to silica or mixed dust.

(27) "Substantial occupational exposure to silica" means employment for a cumulative period of at least five (5) years in an industry and an occupation in which, for a substantial portion of a normal work year for that occupation, the exposed person did any of the following:

(A) Handled silica;

(B) Fabricated silica-containing products so that the person was exposed to silica in the fabrication process;

(C) Altered, repaired, or otherwise worked with a silica-containing product in a manner that exposed the person on a regular basis to silica; or

(D) Worked in close proximity to workers who experienced substantial occupational exposure to mixed dust in a manner that exposed the person on a regular basis to silica;

(28) "Substantial occupational exposure to mixed dust" means employment for a cumulative period of at least five (5) years in an industry and an occupation in which, for a substantial portion of a normal work year for that occupation, the exposed person did any of the following:

(A) Handled mixed dust;

(B) Fabricated mixed dust-containing products so that the person was exposed to mixed dust in the fabrication process;

(C) Altered, repaired, or otherwise worked with a mixed dust-containing product in a manner that exposed the person on a regular basis to mixed dust; or

(D) Worked in close proximity to other workers who experienced substantial occupational exposure to silica in a manner that exposed the person on a regular basis to mixed dust;

(29) "Veterans' benefit program" means any program for benefits in connection with military service under Title 38 of the United States Code; and

(30) "Workers' compensation law" means title 50, chapter 6, and judicial decisions rendered thereunder.

SECTION 5.

(a) No person shall bring or maintain a civil action alleging a silica or mixed dust disease claim based on a nonmalignant condition in the absence of a prima facie showing that, in the opinion of a competent medical authority, the exposed person has a physical impairment, and that the person's exposure to silica or mixed dust is a substantial contributing factor to the physical impairment. The prima facie showing shall include:

(1) Evidence that a competent medical authority has taken from the exposed person a detailed medical history, which includes, to the extent necessary to render the opinion referred to in Section 5 (a), the occupational and exposure history of the exposed person. If the exposed person is deceased, the occupational and exposure history of the exposed person shall be taken from the person or persons who are most knowledgeable about these areas of the exposed person's life;

(2) Evidence verifying that there has been a sufficient latency period in the context of the chronic, accelerated, or acute forms of the silicosis or mixed dust disease;

(3) A diagnosis by a competent medical authority, based on the detailed medical history, a medical examination, and pulmonary function testing, that both of the following apply to the exposed person:

(A) The exposed person has a permanent respiratory impairment rating of at least class 2, as defined by and evaluated pursuant to the AMA guides to the evaluation of permanent impairment; and

(B) The exposed person has silicosis or mixed dust disease based at a minimum on radiological or pathological evidence of silicosis or radiological or pathological evidence of mixed dust disease; and

(4) Verification that the competent medical authority has concluded that exposure to silica or mixed dust was a substantial contributing factor to the exposed person's impairment. A diagnosis which states that the medical findings and impairment are consistent with or compatible with silica or mixed dust exposure does not meet the requirements of this paragraph.

(b) No person shall bring or maintain a civil action alleging that silica or mixed dust caused that person to contract lung cancer in the absence of a prima facie showing that, in the opinion of a competent medical authority, the person has a primary lung cancer, and that the person's exposure to silica or mixed dust is a substantial contributing factor to the lung cancer. The prima facie showing shall include:

(1) Evidence that a competent medical authority has taken from the exposed person a detailed medical history, which includes, to the extent necessary to render the opinion referred to in Section 5 (b), the occupational and exposure history of the exposed person. If the exposed person is deceased, the occupational and exposure history of the exposed person shall be taken from the person or persons who are most knowledgeable about these areas of the exposed person's life;

(2) Evidence sufficient to demonstrate that at least ten (10) years have elapsed from the date of the exposed person's first exposure to silica or mixed dust until the date of diagnosis of the exposed person's primary lung cancer;

(3) Radiological or pathological evidence of silicosis or radiological or pathological evidence of mixed dust disease;

(4) Evidence of the exposed person's substantial occupational exposure to silica or mixed dust; and

(5) Verification that the competent medical authority has concluded that exposure to silica or mixed dust was a substantial contributing factor to the exposed person's lung cancer. A diagnosis which states that the cancer is consistent with or compatible with silica or mixed dust exposure does not meet the requirements of this paragraph.

(c) No person shall bring or maintain a civil action alleging a silica or mixed dust disease claim based on the wrongful death of an exposed person in the absence of a prima facie showing that, in the opinion of a competent medical authority, the death of the exposed person was the result of a physical impairment, and that the person's exposure to silica or mixed dust was a substantial contributing factor to the physical impairment causing the person's death. The prima facie showing shall include:

(1) Evidence that a competent medical authority has taken from the exposed person a detailed medical history, which includes, to the extent necessary to render the opinion referred to in Section 5 (c), the occupational and exposure history of the exposed person. If the exposed person is deceased, the occupational and exposure history of the exposed person shall be taken from the person or persons who are most knowledgeable about these areas of the exposed person's life;

(2) Evidence sufficient to demonstrate that at least ten (10) years have elapsed from the date of the exposed person's first exposure to silica or mixed dust until the date of diagnosis of the exposed person's primary lung cancer or, if the death is not alleged to be cancer-related, evidence verifying that there has been a sufficient latency period in the context of the chronic, accelerated, or acute forms of the silicosis or mixed dust disease;

(3) Radiological or pathological evidence of silicosis or radiological or pathological evidence of mixed dust disease;

(4) Evidence of the exposed person's substantial occupational exposure to silica or mixed dust; and

(5) Verification that the competent medical authority has concluded that exposure to silica or mixed dust was a substantial contributing factor to the exposed person's death. A diagnosis which states that the medical findings, impairment, or lung cancer are consistent with or compatible with silica or mixed dust exposure does not meet the requirements of this paragraph.

(d) Evidence relating to any physical impairment under this Act, including pulmonary function testing and diffusing studies, shall comply

with the technical recommendations for examinations, testing procedures, quality assurance, quality control, and equipment incorporated in the AMA guides to the evaluation of permanent impairment and the official statements of the American Thoracic Society regarding lung function testing, including general considerations for lung function testing, standardization of spirometry, standardization of the measurement of lung volumes, standardization of the single-breath determination of carbon monoxide uptake in the lung, and interpretative strategies for lung testing in effect at the time of the performance of any examination or test on the exposed person required under this Act.

(e) Nothing in this Act shall be interpreted as authorizing the exhumation of bodies.

SECTION 6.

(a) The plaintiff in any civil action who, alleging a silica claim or a mixed dust disease claim, shall file, within one hundred and twenty (120) days after filing the complaint, a written report by a competent medical authority, and any supporting evidence, making out the applicable prima facie case described in Section 5. Any defendant shall have one hundred and twenty (120) days from the filing of the plaintiff's proffered prima facie evidence to challenge the adequacy of the proffered prima facie evidence for failure to comply with the minimum applicable requirements specified in Section 5.

(b) If the court finds that no genuine issue of material fact exists with respect to plaintiff's failure to make out a prima facie case as described in Section 5, the court shall dismiss the plaintiff's claim without prejudice as a matter of law. The court shall maintain its jurisdiction over any case that is so dismissed without prejudice. Any plaintiff whose case has been so dismissed without prejudice may move at any time to reinstate the plaintiff's case, upon a renewed prima facie showing that meets the applicable minimum requirements specified in Section 5.

(c)

(1) The court's findings and decision on the prima facie showing shall not

(A) result in any presumption at trial that the exposed person has a physical impairment that is caused by silica or mixed dust exposure;

(B) be conclusive as to the liability of any defendant in the case; or

(C) be admissible at trial.

(2) If the trier of fact is a jury

(A) the court shall not instruct the jury with respect to the court's findings or decision on the prima facie showing; and

(B) neither counsel for any party nor a witness shall inform the jurors or potential jurors of the prima facie showing.

SECTION 7.

(a) Notwithstanding any other provision of law, with respect to any silica claim or mixed dust disease claim that is not barred as of the effective date of this part, the period of limitations shall not begin to run until the exposed person discovers, or through the exercise of reasonable diligence should have discovered, that the person has a physical impairment resulting from silica or mixed dust exposure.

(b) A court may consolidate for trial any number and type of silica or mixed dust disease claims only with the consent of all of the parties. In the absence of such consent, a court may consolidate for trial any claims relating to the exposed person and members of his or her household.

SECTION 8. The following shall apply to all civil actions for silica or mixed dust disease claims brought against a premises owner to recover damages or other relief for exposure to silica or mixed dust on the premises owner's property:

(1) A premises owner is not liable for any injury to any individual resulting from silica or mixed dust exposure unless that individual's alleged exposure occurred while the individual was on the premises owner's property;

(2) If exposure to silica or mixed dust is alleged to have occurred after January 1, 1972, it is presumed that products containing silica or mixed dust used on the premises owner's property contained silica or mixed dust only at levels below safe levels of exposure. To rebut this presumption, the plaintiff must prove by a preponderance of the evidence that the levels of silica or mixed dust in the immediate breathing zone of the plaintiff regularly exceeded the threshold limit values adopted by this state; and

(3)

(A) A premises owner is presumed to be not liable for any injury to any invitee who was engaged to work with, install, or remove products containing silica or mixed dust on the premises owner's property if the invitee's employer held itself out as qualified to perform the work. To rebut this presumption, the plaintiff must demonstrate by a preponderance of the evidence that the premises owner had actual knowledge of the potential dangers of the products containing silica or mixed dust at the time

of the alleged exposure that was superior to the knowledge of both the invitee and the invitee's employer.

(B) A premises owner that hired a contractor before January 1, 1972, to perform the type of work at the premises owner's property that the contractor was qualified to perform shall not be liable for any injury to any individual resulting from silica or mixed dust exposure caused by any of the contractor's employees or agents on the premises owner's property unless the premises owner directed the activity that resulted in the injury or approved the critical acts that led to the individual's injury.

(C) If exposure to silica or mixed dust is alleged to have occurred after January 1, 1972, a premises owner is not liable for any injury to any individual resulting from that exposure caused by a contractor's employee or agent on the premises owner's property, unless the plaintiff establishes the premises owner's intentional violation of an established safety standard in effect at the time of the exposure, and that the alleged violation was in the plaintiff's immediate breathing zone and was the proximate cause of the plaintiff's injury.

SECTION 9.

(a) No civil action alleging a silica claim or mixed dust disease claim may be filed in the courts of Tennessee after the effective date of this part unless the plaintiff was a resident of Tennessee at the time the claim arose or the plaintiff's claim arose in Tennessee. For purposes of this part, a claim arises in Tennessee if the plaintiff was located in Tennessee at the time the plaintiff alleges to have been exposed to silica or mixed dust.

(b) To comply with this section in relation to an action that involves both claims that arose in this state and claims that arose outside this state, a court shall consider each claim individually and shall sever from the action the claims that are subject to this part.

(c) A civil action under this part may be filed only in the venue where the plaintiff resides, or was exposed to silica, mixed dust, or both, that was a substantial contributing factor to the physical impairment on which plaintiff's claim is based. If a plaintiff alleges that the plaintiff was exposed to silica, mixed dust, or both, in more than one (1) venue, the court shall determine, upon motion of any defendant found outside the venue in which the tort action is pending, which venue is the most appropriate forum for the claim, considering the relative amounts and lengths of the plaintiff's exposure to silica or mixed dust in each venue.

SECTION 10. This Act shall apply to all civil actions that allege a silica or mixed dust disease claim that are filed on or after the effective date of this Act.

SECTION 11. If any provision of this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to that end the provisions of this Act are declared to be severable.

SECTION 12. This Act shall take effect July 1, 2006, the public welfare requiring it.

PASSED: May 4, 2006


JIMMY NAIFEH, SPEAKER
HOUSE OF REPRESENTATIVES


JOHN S. WILDER
SPEAKER OF THE SENATE

APPROVED this 22nd day of May 2006


PHIL BREDESEN, GOVERNOR